

1 WRITTEN DECISION - NOT FOR PUBLICATION

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CLERK, U.S. BANKRUPTCY COURT	
SOUTHERN DISTRICT OF CALIFORNIA	
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8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 In re:) CASE NO. 05-14063-H7
11 VLADISLAV ZUBKIS,) (RS No. JJG-1)
12 Debtor.) MEMORANDUM DECISION
13)

14 The U.S. Securities and Exchange Commission ("SEC") moves for
15 relief from stay pursuant to 11 U.S.C. § 362(d) with respect to
16 assets being held pursuant to the orders of the United States
17 District Court for the Southern District of New York (the "district
18 court") by Thomas J. Lennon, Inc., receiver (the "receiver"). The
19 assets, a yacht (the "yacht") and funds in certain escrow accounts
20 at Laurel Hill Escrow Services, Inc. ("Laurel Hill") in the amount
21 of \$46,795.30 (the "funds"), are located in California.

22 The chapter 7 trustee, Leslie Gladstone (the "trustee"), and
23 the debtor objected.¹ The matter was heard on December 15, 2005.
24 After considering the pleadings and oral argument, the Court took
25 the matter under submission.

26 At issue is whether SEC properly followed New York state law
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¹ The Court does not discuss debtor's objection because it seeks to collaterally attack the district court's judgment and its findings regarding his interest in the yacht and the funds.

1 procedure for enforcing its money judgment against the debtor,
2 thereby giving it a fully perfected security interest in the yacht
3 and the funds, and priority over the trustee.

4 This Court has jurisdiction to determine this matter pursuant
5 to 28 U.S.C. §§ 1334 and 157(b) (1) and General Order No. 312-D of
6 the United States District Court for the Southern District of
7 California. This is a core proceeding pursuant to 28 U.S.C.
8 § 157(b) (2) (A) .

9 I.

10 FACTS

11 On June 21, 2001, SEC obtained a money judgment against the
12 debtor in the district court which required him to disgorge more
13 than \$12 million. Debtor failed to pay any portion of the judgment
14 and SEC commenced supplementary proceedings to execute on its
15 judgment.

16 On August 11, 2003, the district court entered an Order to
17 Show Cause for Civil Contempt, With Ex Parte Freeze, Asset Seizure,
18 Appointment of Receiver, Turnover Order, and Order for Expedited
19 Discovery (the "August 11 Order"). The August 11 Order finds that
20 SEC had made a prima facie showing that debtor was in contempt for
21 failing to pay the disgorgement ordered by the judgment and that he
22 was the legal or equitable owner of the yacht and the funds held in
23 certain escrow accounts at Laurel Hill. The August 11 Order
24 directed the United States Marshal for the Southern District of
25 California to seize the yacht and then place it in the custody of
26 the receiver. The August 11 Order also appointed the receiver and
27 directed him to take custody of the yacht. On August 12, 2003, the
28 Marshal seized the yacht, and turned it over to the receiver.

1 On September 10, 2003, the district court entered an order
2 finding the debtor in contempt for his failure to pay the
3 disgorgement ordered by the judgment.

4 On January 22, 2004, the district court extended the asset
5 freeze of the September 10, 2003, order to additional escrow
6 accounts at Laurel Hill. The receiver obtained the funds from the
7 escrow accounts in February 2004.

8 On June 30, 2005, the district court found that the debtor is
9 the owner of the yacht and ordered the yacht sold in partial
10 satisfaction of debtor's disgorgement obligation.

11 On October 14, 2005, debtor filed his voluntary petition under
12 chapter 7.

13 II.

14 DISCUSSION

15 SEC argues, among other things,² that it is entitled to relief
16 from stay because it has the equivalent of a fully perfected
17 security interest in the yacht and the funds and the debtor has no
18 equity in either.³ SEC contends that the August 11 Order was the
19 functional equivalent of a levy under New York law. SEC relies on
20

21 ² SEC argues that the assets held by the receiver are held in constructive
22 trust on behalf of the investors the debtor defrauded. The Court finds it
23 unnecessary to discuss SEC's constructive trust theory because it finds that SEC
24 has a fully perfected security interest in the assets. SEC also argues that it
25 should get relief from stay because the debtor filed his chapter 7 case in bad
26 faith, omitting assets from his schedules and filing incorrect Statement of Affairs.
This aspect of SEC's motion was not dealt with at the hearing and would require at
the very least an evidentiary hearing. The debtor did not appear at the hearing.
Therefore, the Court does not make any findings with respect to the debtor's alleged
bad faith.

27 ³ The receiver obtained an appraisal of the yacht showing that the current
28 value is \$375,000. The value of the yacht and the funds is substantially below the
amount of SEC's judgment. Therefore, the debtor does not have equity in either
asset. The trustee does not dispute the lack of equity.

1 Federal Rule Civil Procedure 69(a) [hereinafter "Rule 69(a)"]⁴ and
2 28 U.S.C. § 2413 which is the "long-arm" execution statute and
3 provides a special rule for executions on judgments in favor of the
4 United States.⁵

5 A. STANDARDS FOR RELIEF FROM STAY

6 Bankruptcy Code § 362(d) permits this Court to grant relief
7 from the stay upon a request of a party in interest under the
8 following circumstances:

9 (1) for cause, including the lack of adequate protection of
10 an interest in property of such party in interest; or

11 (2) with respect to a stay of an act against property if --

12 (a) the debtor does not have an equity in such property;
13 and

14 (b) such property is not necessary to an effective
15 reorganization.

16 The party requesting relief from the stay has the burden of
17 proof on the issue of the debtor's equity in the property while
18 the party opposing such relief has the burden on all other issues.

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21 _____
22 ⁴ Rule 69(a) provides that the procedure for enforcing federal court judgments
23 "shall be made in accordance with the practice and procedure of the state in which
24 the district court is held," in this case New York, "except that any statute of the
25 United States governs to the extent that it is applicable." Postjudgment remedies
26 to enforce a money judgment in New York are set forth in Article 52 of the New York
27 Civil Practice Law and rules ("CPLR").

28 ⁵ 28 U.S.C. § 2413 provides: "A writ of execution on a judgment obtained for
the use of the United States in any court thereof shall be issued from and made
returnable to the court which rendered the judgment, but may be executed in any
other State, in any Territory, or in the District of Columbia."

1 11 U.S.C. § 362(g) (1) & (2).⁶

2 B. SEC'S PRIORITY IN OR "LIEN" IN THE YACHT AND THE
3 FUNDS UNDER NEW YORK LAW

4 1. CPLR 5202(a): Execution

5 CPLR 5202(a) governs when a judgment creditor proceeds by way
6 of execution. That section states that when a judgment creditor
7 has delivered an execution to a sheriff, the judgment creditor's
8 rights "in an interest of the judgment debtor in personal property,
9 ... are superior to the extent of the execution to the rights of
10 any transferee of the property," with two exceptions, neither of
11 which is applicable here.⁷ Although SECTION does not specifically
12 use the word "lien," numerous cases have held that the judgment
13 creditor acquires a lien on personal property of the debtor when
14 the execution is delivered to the sheriff. Balaber-Strauss v.
15 Marine Midland Bank, N.A. (In re Marceca), 129 B.R. 369, 370
16 (Bankr. S.D.N.Y. 1991) (citations omitted).

17 The trustee contends that the August 11 Order is not the
18 equivalent of a writ of execution because under New York law there
19 are certain requirements that must be met for a piece of paper to
20

21 ⁶ One court noted that a "lift stay motion is an inappropriate vehicle for
22 declaring the extent of an interest in property. An adversary proceeding is
23 required." In re Pandeuff, 201 B.R. 865, 870 (Bankr. S.D.N.Y. 1996) (citation
24 omitted). The court went on to explain that the burden of proof in an adversary
25 proceeding would be on the creditor claiming an interest in the debtor's property
26 to prove the validity of its lien." Therefore, the burden is on SEC to prove the
27 validity of its lien in the yacht and the funds.

28 ⁷ The first exception is for a "transferee who acquired the ...property for
fair consideration, before it was levied upon." CPLR 5202(a) (1). SECond exception
applies to a transferee who acquired a debt or personal property not capable of
delivery for fair consideration after it was levied upon without knowledge of the
levy." CPLR 5202(a) (2). Neither exception applies because there was no transferee
who acquired the yacht before the Marshall seized it in August 2003, and because
the yacht is "capable of delivery."

1 become a writ of execution. According to the trustee it "has to
2 say it's a writ of execution." [Transcript Dated December 15, 2005
3 6:18-19]. "It must include the last known address of the judgment
4 debtor." Id. at 6:20. "The execution must be returned within
5 sixty days of its issuance." Id. at 7:2-3. According to the
6 trustee, none of these requirements are met. The trustee further
7 maintains that there must be language stating that the Marshall is
8 to "seize and sell" and "you can't have a writ of execution without
9 a requirement or direction to sell." Id. 11:9-10.

10 The Court examined the August 11 Order for its content to
11 determine whether it substantially complies with the requirements
12 under CPLR 5230. That section governs the "form" for personal
13 property execution, a paper delivered to the sheriff. That section
14 states:

15 (a) Form. An execution shall specify the date
16 that the judgment or order was entered, the
17 court in which it was entered, the amount of
18 the judgment or order and the amount due
19 thereon and it shall specify the names of the
20 parties in whose favor and against whom the
21 judgment or order was entered. An execution
22 shall direct that only the property in which a
23 named judgment debtor or obligor who is not
24 deceased has an interest, or the debts owed to
25 the named judgment debtor or obligor, be levied
26 upon or sold thereunder and shall specify the
27 last known address of that judgment debtor or
28 obligor. Where the judgment or order was
entered in a court other than the supreme,
county or a family court, the execution shall
also specify the date on which a transcript of
the judgment or order was filed with the clerk
of the county in which the judgment was
entered. Where jurisdiction in the action was
based upon a levy upon property or debt
pursuant to an order of attachment, the
execution shall also state that fact, describe
all property and debts levied upon, and direct
that only such property and debts be sold
thereunder. Where the judgment or order was
recovered for all or part of a mortgage debt,

1 the execution shall also describe the mortgaged
2 property, specify the book and page where the
3 mortgage is recorded, and direct that no part
4 of the mortgaged property be levied upon or
5 sold thereunder.

6 The mechanics of the sheriff's activity on the execution are
7 set forth in CPLR 5232 which authorizes a levy by seizure which was
8 done here, and 5233 which sets forth the requirements for a sale,
9 which is pending on the outcome of this motion.

10 The Court agrees with SEC and finds that the August 11 Order
11 is the equivalent of a writ of execution. The August 11 Order
12 substantially complies with the "form" required under CPLR 5230.
13 Specifically, it specifies the date that the judgment was entered,
14 the amount of the judgment, and the names of the parties in whose
15 favor and against whom the judgment was entered. The order further
16 makes a finding that the debtor is the equitable owner of the yacht
17 and provides for the levy on the yacht.

18 The trustee cited no authority that stands for the proposition
19 that a federal court must strictly follow the state law procedure
20 for enforcing judgments, probably because the law is to the
21 contrary. "Substantial compliance with the procedural provisions of
22 the state statutes is sufficient." 12 Wright & Miller, Fed. Prac.
23 & Proc., Civ.2d § 3012 at n.29 (2005) (citing numerous cases); see
24 also Thomas, Head and Greisen Employees Trust v. Buster, 95 F.3d
1449, 1452 (9th Cir. 1996) (citations omitted).⁸ In Thomas, Head,

25 ⁸ Thomas, Head commenced a supplementary proceeding, alleging that the
26 defendant, Buster, had fraudulently conveyed his assets to third parties in
27 violation of Alaska law. Buster and the third parties asserted that under Rule
28 69(a) and the Alaska procedure it incorporates, a judgment creditor must bring an
independent action in state court to set aside the postjudgment fraudulent
conveyances of a judgment debtor. The Ninth Circuit noted that although Alaska law
did not expressly authorize postjudgment fraudulent transfer actions, it did permit
the use of a postjudgment order to prevent fraudulent transfers. Therefore, the

1 the Ninth Circuit noted that "Federal Rule 69(a) is in substance a
2 choice-of-law provision not 'meant to put the judge into a
3 procedural straitjacket, whether of state or federal origin '"

4 a. LONG-ARM EXECUTION

5 The trustee also argues that a New York court does not
6 have the right to say there's a lien on California property. [see
7 Trustee's Brief in Opp. at p. 6, n.4]. The Trustee filed a
8 supplemental brief regarding this issue on December 29, 2005, which
9 cites Butner v. United States, 440 U.S. 48, 55 (1979) for the
10 proposition that the creation of a security interest is a matter of
11 state law and not federal law. The trustee further argues that
12 this Court should not interpret 28 U.S.C. § 2413 in a manner to
13 allow laws from other states to create security interests within
14 the State of California. According to the trustee, there would be
15 uncertainty as to whether liens in California property were in fact
16 created by a judgment in favor of the United States in another
17 jurisdiction.

18 The Court finds the trustee's citation and argument
19 unpersuasive. The Court cannot ignore the plain language of a
20 federal statute that authorizes the United States government to
21 execute on its judgments beyond the territorial limits of the state
22 in which the court issuing the judgment sits. A writ obtained for
23 the use of the United States may be executed in any state. "Long-
24 arm execution" under 28 U.S.C. § 2413 is reserved for judgments for
25 use of the United States. United States v. Palmer, 609 F.Supp.

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28 Ninth Circuit found that the "procedure followed here ... accord[ed] with the spirit
of the Rules and ... was a sufficiently close adherence to state procedures." Id.
at 1452.

1 544, 547 (E.D. Tenn. 1985). This statute allows the government to
2 bypass the local registration requirements and execute a federal
3 judgment in any district in which the debtor owns property simply
4 by delivering the writ of execution to the local U.S. Marshal.
5 "Under § 2413, the law of the state in which the court of judgment
6 sits controls execution proceedings, even if the execution is
7 actually made in another state." Id. Therefore, SEC's execution
8 lien on the yacht arose at the time the August 11 Order was
9 delivered to the Marshall in San Diego.⁹ Marceca, 129 B.R. at 370.

10 2. CPLR 5202(b): Appointment of Receiver and Delivery of
11 Property

12 "[O]ne of the things that will give a judgment creditor a
13 lien on personal property of the judgment debtor is an order
14 appointing a receiver of that property." CPLR 5228.5

15 The Court finds that SEC also has a lien on both the yacht and
16 the funds pursuant to CPLR 5202(b) which provides:

17 Where a judgment creditor has obtained an order
18 for delivery of, payment of, or appointment of
19 a receiver of, a debt owned to the judgment
20 debtor or an interest of the judgment debtor in
21 personal property, the judgment creditor's
22 rights in the debt or property are superior to
the rights of any transferee of the debt or
property, except a transferee who acquired the
debt or property for fair consideration and
without notice of such order.

23 New York law allows for the appointment of a receiver to aid in the
24 enforcement of a money judgment. CPLR 5228 states that "[t]he
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26 ⁹ Additionally, CPLR 5234(b) provides that the first execution delivered to
27 the sheriff (here the Marshall) has priority over any execution subsequently
28 delivered to an enforcement officer. Thus, at the time of the seizure, the interest
of SEC as a judgment creditor was superior to the interest any other person could
obtain in and to the yacht.

1 order of appointment shall specify the property to be received, the
2 duties of the receiver and the manner in which they are to be
3 performed." It further states that "[i]f a receiver has been
4 appointed, a court making an order directing payment, or delivery,
5 of property shall direct that payment, or delivery, be made to the
6 receiver rather than to the sheriff." CPLR 5228(a).

7 The aim of the post-judgment receivership of
8 CPLR 5228 (sic) is to effectuate the judgment.
9 The CPLR 5228 receivership, addressed to the
10 money judgment, is designed to get at any
11 property of the judgment debtor so as to sell
12 it and pay the judgment out of the proceeds, or
13 to make it produce income with the like aim of
14 applying it to pay the judgment. CPLR 5228.4.

15 CPLR 5234 determines liens and priorities in
16 personal property among judgment creditors, and
17 one of the things that will give a judgment
18 creditor a lien on personal property of the
19 judgment debtor is an order appointing a
20 receiver of that property.... Recognizing this,
21 the judgment creditor should assure that the
22 order specifies the personal property being
23 received. It is the filing of the receivership
24 order that brings about the lien, or, more
25 accurately, the moment of priority for the
26 judgment creditor. CPLR 5228.5.

27 The August 11 Order appointed the receiver to aid SEC in the
28 enforcement of its money judgment against the debtor. It
specifically mentions the yacht and the funds and gives the
receiver specific directions with respect to the yacht. Subsequent
orders from the district court maintained the August 11 Order's
asset freeze on the funds and eventually the funds were turned over
to the receiver in February 2004. The Court finds that the August
11 Order therefore created a lien on the yacht under CPLR 5202(b).
In addition, the August 11 Order appointing the receiver, and
subsequent orders regarding the asset freeze on the escrow accounts

1 and the turnover of the funds to the receiver also create a lien on
2 the funds under CPLR 5202(b). Again, SEC was able to use the long-
3 arm execution statute to obtain its lien on the yacht and the funds
4 located in California.¹⁰

5 C. SEC'S LIEN IS PERFECTED AND NOT AVOIDABLE

6 In the event the Court finds SEC does have liens on the yacht
7 and the funds, the trustee argues that she may avoid the liens
8 pursuant to 11 U.S.C. § 545(c)(1)(C) and 545(2) which provides that
9 a trustee may avoid the fixing of a statutory lien on property of
10 the debtor to the extent that such lien -

11 1) first becomes effective against the debtor -

12 (C) when a custodian is appointed or authorized to take
13 possession;

14 2) is not perfected or enforceable at the time of the
15 commencement of the case against a bona fide purchaser
16 that purchases such property at the time of the
17 commencement of the case, whether or not such a purchaser
18 exists.¹¹

17 Bankruptcy Code § 545 addresses statutory liens. The
18 definition of a statutory lien under § 101(53) specifically
19 excludes a judicial lien and further provides that a judicial lien

20 _____
21 ¹⁰ A judgment creditor who obtains the appointment of a receiver is entitled
22 to priority over other judgment creditors. CPLR 5234(c).

23 ¹¹ The trustee does not rely on her avoidance powers under § 544.
24 Nonetheless, SEC addressed the trustee's inability to use her avoidance powers under
25 § 544(a) in its initial motion and its reply. In considering the trustee's
26 avoidance powers under § 544(a) in conjunction with CPLR 5202 and 5234, one court
27 noted that "it is well settled that the trustee does not have the rights of a bona
28 fide purchaser of personalty." Barr v. Nat'l Aircraft Serv. (In re Cosmopolitan
Aviation Corp.), 34 B.R. 592, 595 (Bankr. E.D.N.Y. 1983). Accord Marceca, 129 B.R.
at 370 ("In view of the fact that 11 U.S.C. section 544(a) does not empower a
trustee in bankruptcy to assert the rights of a hypothetical bona fide purchaser
of personal property, it follows that the [SEC's] [sic] lien rights as a transferee
of the debtor's personal property pursuant to § 5202 of the New York Civil Practice
Law and Rules are superior to the rights of the trustee in bankruptcy....").

1 remains as such even if it is "provided by," "dependant on," or
2 "made fully effective by" a statute (such as the provisions of the
3 New York CPLR). A judicial lien is defined as a lien "obtained by
4 judgment, levy, sequestration, or other legal or equitable process
5 or proceeding." 11 U.S.C. § 101(36).

6 SEC's lien is not a statutory lien, but a judicial lien that
7 arose after its judgment was enforced through the judicial process
8 by writ of execution. See In re Pandeff, 201 B.R. 865, 874 (Bankr.
9 S.D.N.Y. 1996) ("[I]n order to create a judgment lien on
10 personalty, the judgment creditor must either 'execute' on the
11 judgment or obtain an enforcement order.") (applying New York law)
12 (citations omitted). Therefore, the trustee is unable to avoid
13 SEC's liens on the yacht or the funds pursuant to Code § 545.

14 Because the Court finds that SEC's liens on the yacht and the
15 funds are fully perfected and cannot be avoided by the trustee, and
16 that no equity exists for the benefit of this estate in either
17 asset, the Court grants SEC's motion.

18 III.

19 CONCLUSION

20 The Court finds that SEC has a fully perfected lien on both
21 the yacht and the funds. The trustee is unable to avoid those
22 liens. Since SEC's judgment far exceeds the value of the yacht and
23 the funds, there is no equity in either asset. Therefore, the
24 Court finds cause exists to lift the stay and grants SEC's motion.

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1 This Memorandum Decision constitutes findings of fact and
2 conclusions of law pursuant to Federal Rule of Bankruptcy Procedure
3 7052. Counsel for SEC is directed to file with this Court an order
4 in conformance with this Memorandum Decision within ten (10) days
5 from the date of entry hereof.

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7 Dated: February 7, 2006

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9 JOHN J. HARGROVE
UNITED STATES BANKRUPTCY JUDGE

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991**

In re: Bankruptcy Case No. 05-14063-H7 (RS No. JJG-1)

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

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Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on February 7, 2006



Karen Nickerson (Deputy Clerk)
Judicial Assistant to the Honorable John J. Hargrove